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May 13, 2004 4:12PM DOJ LIT SECURITY

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NO. 083 P.1

[REDACTED]

FILED: May 13, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4792
(CR-01-455)

FILED WITH
COURT SECURITY OFFICER
John P. Maloney
DATE 5/13/2004

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ZACARIAS MOUSSAOUI,

Defendant-Appellee.

ORDER

Presently pending before this court is a petition for rehearing filed by Appellee Zacarias Moussaoui. As noted in the opinion filed by the court on April 22, 2004, Moussaoui seeks access to certain individuals ("the enemy combatant witnesses") who, he asserts, can provide material evidence in defense of the charges against him. The Government has refused to produce these witnesses for depositions, asserting that any interference in the [REDACTED] process will have devastating consequences for national security.

[REDACTED]

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During the course of the previous appeal in this matter, this court directed a limited remand to the district court for the purpose of considering whether substitutions were available for the deposition testimony of the sole enemy combatant witness then at issue. At a hearing regarding substitutions, the district court inquired of the Government whether it would be possible to submit written questions to the enemy combatant witness. The Government rejected this alternative. See United States v. Moussaoui, No. 01-455-A, at 14 (E.D. Va. May 15, 2003) (opinion on remand) (citing Attachment A to Protective Order Pursuant to CIPA Section 4 (May 9, 2003); in camera, ex parte Declaration (May 9, 2003)). The question was raised again during arguments before this court in the previous appeal (No. 03-4162), when a member of the court inquired whether it would be possible to submit written questions to the witness then under discussion. The Government unequivocally rejected such a possibility, asserting that

[REDACTED]

Tr. of sealed proceedings, at 13 (4th Cir. June 3, 2003); see id. at 18

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In a letter submitted to the court on May 12, 2004, the Government informed this court for the first time that "members of the prosecution team ... [REDACTED]

[REDACTED] have provided [REDACTED] information [REDACTED] Letter to Lisa Jernigan, Deputy Clerk, at 2 (May 12, 2004). The Government did note that "[a]ny information [REDACTED] that have been shared [REDACTED] have been used, like information from numerous other sources, at the sole discretion [REDACTED]

[REDACTED] Id. at 3. Nevertheless, the information contained in the letter is arguably inconsistent with statements previously made to the court. See Tr. of sealed proceedings, at 19 (4th Cir. June 3, 2003) ("[W]hatever [information] was provided to the prosecutors and what was provided to the defense was [REDACTED]

The Government is hereby directed to submit a response to the petition for rehearing and suggestion for rehearing en banc. This response is not limited to, but shall include, a discussion of the following issues: (1) why the information in the May 12 letter was not provided to this court or the district court prior to May 12; (2) the identity and role in the prosecution of the "members of [REDACTED]

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[REDACTED]

the prosecution team" who [REDACTED]

[REDACTED] have provided [REDACTED] information [REDACTED]

[REDACTED] (3) [REDACTED]

(4) [REDACTED]

the results [REDACTED] have provided inculpatory or exculpatory information regarding Moussaoui; (5) in light of the information contained in the May 12 letter and any other pertinent developments, would it now be appropriate to submit written questions to any of the enemy combatant witnesses; (6) what restrictions would apply to such a process and how should it be conducted; (7) if access is granted by written questions, is the Compulsory Process Clause satisfied; (8) if access is granted by written questions, what effect, if any, would Crawford v. Washington, 124 S. Ct. 1354 (2004), have on such a process; and (9) if circumstances have changed such that submission of written questions is now possible, when did the circumstances change and why was neither this court nor the district court so informed at the time. The response shall be filed with the Court Security Officer assigned to this case on or before May 19, 2004. Any reply by Appellee shall be filed with the Court Security Officer assigned to this case on or before May 24, 2004. No extensions to these deadlines will be granted.

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The panel will conduct a sealed hearing regarding the petition for rehearing on Thursday, June 3, 2004 at 2:30 p.m.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Williams and Judge Gregory.

[REDACTED]

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[REDACTED]